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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN AVILA, Defendant and Appellant.	B189487 (Los Angeles County Super. Ct. No. KA071360)

APPEAL from a judgment of the Superior Court of Los Angeles County. Philip S. Gutierrez, Judge. Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Herbert S. Tetef and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Adrian Avila appeals from the judgment of conviction of possession of methamphetamine. Following his conviction, he was sentenced to 25 years to life as a Three Strikes offender. He contends the trial court prejudicially erred in denying his motions: (1) for mistrial; and (2) to strike the alleged Three Strikes priors; and (3) that imposition of a 25 year to life sentence constituted cruel and unusual punishment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence adduced at trial established that at about 2:15 p.m. on June 28, 2005, Officer Richard Cano and Sergeant Dennis Demerjian of the El Monte Police Department obtained permission to enter a trailer from the resident. Inside, the officers saw defendant lying on a bed, apparently asleep, with his right hand in his right front pants pocket. Concerned that defendant might have had a weapon, Cano instructed defendant to take his hand out of his pocket after Demerjian awakened him. When defendant did not comply, Cano repeated his request. Still non-compliant, defendant asked "why?" The officers explained that they were there to contact defendant at the request of a parole agent. When, after repeated requests, defendant removed his hand, Demerjian instructed him to sit up and get off the bed. Defendant refused. Demerjian repeated the request several times until Cano and Demerjian eventually gripped defendant's arms and tried to pull him up. When defendant resisted, Cano gave defendant a warning then sprayed him with pepper spray. Defendant was handcuffed and walked outside. In a pat-down search of defendant's person, Cano found a plastic baggie containing 3.73 grams of methamphetamine. Cano estimated this amount was equal to between 170 and 200 doses.

DISCUSSION

1. *Motion for Mistrial*

Defendant contends the trial court abused its discretion when it denied his motion for mistrial based on Cano's reference to defendant's parole status despite an order precluding such evidence. He argues that he was denied a fair trial as a result of the jury hearing the evidence. We agree it was improper for Officer Cano to have violated a court order (assuming the prosecutor had advised the officer of it), but we conclude a mistrial was not required.

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Lucero* (2000) 23 Cal.4th 692, 713, internal quotations and citations omitted.) "There is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial. [¶] Whether in a given case the erroneous admission of such evidence warrants granting a mistrial or whether the error can be cured by striking the testimony and admonishing the jury rests in the sound discretion of the trial court." (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580, internal citations omitted.) In *People v. Williams* (1981) 115 Cal.App.3d 446, 453, a fleeting reference to the defendant's parole status was found to be not so prejudicial as to require a mistrial, despite the fact that the testimony violated a court order excluding such evidence.

Here, defendant was represented by counsel on September 20, 2005, when the trial court granted his motion to exclude evidence that defendant was a parolee. On September 22, 2005, after a jury was impaneled, defendant's motion to represent himself was granted. While defendant was representing himself, Cano testified that defendant refused several requests to take his hands out of his pocket; this exchange followed: "[THE PROSECUTOR]: And instead of complying, how did the defendant respond? [¶]

[CANO]: He was continually asking us, 'why?' [¶] [THE PROSECUTOR]: And when he would continually ask you 'why,' how would you respond? [¶] [CANO]: We told him that we were there to contact him because of a parole agent asking us to take him into custody for a parole hold." Defendant did not object.[1]

Later in the proceeding, the trial court found defendant disruptive, terminated his self-representation and appointed standby counsel. Standby counsel immediately made a motion for mistrial on the grounds that Cano had mentioned defendant's parole status in his testimony. The trial court observed that, notwithstanding defendant's failure to object to the challenged testimony, "I think the court on its own motion could have. I did not at the time because almost – in trying to – [defendant] may not believe it – but to protect his interest, I wasn't sure if I wanted to highlight it to the jurors at that point in time by asking them not to regard that statement as a parolee. [¶] So I think even though it wasn't objected to, I think I have an obligation under [defendant's] right to a fair trial to address that issue when it's presented to me, and I was anticipating it would be presented to me at the break by either a mistrial or a curative instruction. [¶] Given what the testimony was, I do not believe that that testimony by itself would impair [defendant's] right to a fair trial, so I would deny it in this trial." The trial court agreed to instruct the jury to disregard Cano's testimony concerning defendant's parole status. Accordingly, it instructed: "During the testimony of Agent Cano, he referred to [defendant's] status as a parolee. That testimony is now struck, and you are not to consider that testimony in any way. It must not affect your verdict in any way."[2]

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[1] Instead of asking Officer Cano a "how" question which invited a more descriptive answer, the prosecutor appropriately should have led the witness to avoid any reference to parole.

[2] Defendant makes much of the fact that the jury heard the challenged testimony a second time, during the jury requested read-back of Cano's testimony. The read-back itself was not reported, but since the trial court struck the testimony, we presume that the court reporter did not include the stricken testimony in the read-back. If the stricken evidence was not omitted, defendant may raise its significance by way of habeas relief.

Under these circumstances, we find the trial court did not abuse its discretion in denying the motion for mistrial. Cano's reference to defendant's parole status was relatively brief; at defendant's request, the jury was instructed not to consider it in any way in their deliberations and the evidence was stricken from the record. (*People v. Williams, supra*, 115 Cal.App.3d at p. 453.)

2. *Motion to Strike Prior Convictions*

Defendant contends the trial court abused its discretion when it denied his *Romero* motion to strike his prior convictions.[3] He points out that the current conviction was not for a "serious" or "violent" felony, did not involve weapons or violence, his prior convictions were remote in time, and the trial court had previously indicated it would accept an open plea with an 11 year, 3 month lid. We find no abuse of discretion.

In reviewing the trial court's determination of a motion to strike a Three Strikes prior conviction, we "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, the amended information alleged three prior convictions pursuant to the Three Strikes law. As summarized by the trial court, defendant's criminal history included the following: a 1988 convictions for shooting at an occupied vehicle and two counts of attempted murder; a 1999 conviction for possession of cocaine base for sale; a 2002 misdemeanor conviction for spousal battery; and a 2002 conviction for driving under the influence.

At the hearing on defendant's *Romero* motion, defense counsel argued that the nature and circumstances of the current offense; the circumstances of defendant's prior

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3 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

convictions; the remoteness in time of those priors; the decreasing severity of his convictions; and his age, background and character all militated in favor of striking two of the alleged strikes so as to allow a determinative sentence to be imposed. It is true that defendant's current conviction – possession of a controlled substance – is not a "violent" or "serious" felony under California's sentencing scheme. (Pen. Code, § 667.5, subd. (c), § 1192.7, subd. (c).) The prosecutor conceded that the general policy of the District Attorney was to request that the court strike all but one prior felonies where the current offense was not for a violent or serious felony, but noted that defendant's record was not outside the spirit of the Three Strikes law.

After summarizing defendant's history of recidivism, the trial court observed that defendant had apparently enjoyed the benefit of *Romero* in the sentencing on his 1999 conviction for possession of cocaine base. Concluding that it would not be appropriate to strike a strike in this case, the trial court denied the *Romero* motion.

We find no abuse of discretion in the trial court's ruling. Defendant's criminal history demonstrates that he has been unable to benefit from the rehabilitative aspect of the penal system. As such, he is the kind of recidivist that comes squarely within the spirit of the Three Strikes law.

3. *Cruel and Unusual Punishment*

Defendant contends the imposition of a 25 year to life sentence constitutes cruel and unusual punishment under the Eighth Amendment in this case. He argues that possession of methamphetamine is not a serious or violent felony, is, in fact, a "wobbler" eligible for punishment as a misdemeanor and did not involve violence, weapons or injury. We are unpersuaded.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishment." Under the Three Strikes law, "defendants are punished not just for their current offense but for their recidivism. Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823 (*Cooper*).)

In *Ewing v. California* (2003) 538 U.S. 11, the United States Supreme Court held: "When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice." (*Id*. at p. 25.) Five justices agreed that a sentence of 25 years to life for a recidivist criminal who stole three golf clubs did not violate the Eighth Amendment. (*Id*. at pp. 31, 32.)

In *Cooper, supra*, 43 Cal.App.4th 815, the defendant was convicted of being a felon in possession of a firearm and sentenced to 25 years to life under the Three Strikes law. Rejecting the defendant's Eighth Amendment challenge to the sentence, the court in *Cooper* held: "The imposition of a 25-year-to-life term for a recidivist offender, like appellant, convicted of a nonviolent, nonserious felony but with at least 2 prior convictions for violent or serious felonies is not grossly disproportionate to the crime." (*Id*. at p. 825.)

Here, like the defendant in *Cooper*, defendant is not being sentenced to life in prison only for the non-violent, non-serious offense of being in possession of methamphetamine, but for his recidivism. As such, his sentence does not violate his rights under the state or federal constitutions.

DISPOSITION

The judgment is affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

BOLAND, J.

FLIER, J.